

While the original award was on appeal, respondent and its insurance carrier learned that claimant had begun working and, therefore, no longer had a 100 percent wage loss. Because of that change of circumstances, respondent and its insurance carrier filed an application for review and modification. That application was filed on October 28, 1999.

On February 14, 2000, three days after the Court of Appeals issued its decision affirming the Board's order, Judge Benedict decided the review and modification proceeding and found that claimant's wage loss had changed because claimant had returned to work. In the review and modification proceeding, the Judge reduced the permanent partial general disability to claimant's nine percent whole body functional impairment rating. The Judge also determined that the effective date of the modification of the award was April 28, 1999, which was six months preceding the filing date of the review and modification application.¹ Because the Workers Compensation Act provides a scheme for the rapid payout of benefits, the practical effect of the modification of the award was to terminate the permanent disability benefits as of its April 28, 1999 effective date.

While the original award was pending before both this Board and the Court of Appeals, respondent and its insurance carrier paid claimant the weekly benefits which were accruing under the award and which were required to be paid during such appeals.² Those benefits were paid from March 6, 1998, through December 9, 1999.

Respondent and its insurance carrier now request credit for the payments made to claimant while the appeals were pending before both this Board and the Court of Appeals. But claimant contends that respondent and its insurance carrier should not be given credit for all of those weeks. The parties presented that issue to the Judge at the hearing that was held on April 5, 2000. By Order dated July 21, 2000, Judge Benedict decided that respondent and its insurance carrier were entitled to the credit. Claimant then filed this appeal. The issues before the Board on this appeal are:

1. When paying the review and modification award, are respondent and its insurance carrier entitled to a credit for the permanent partial disability benefits that were paid to claimant during the appeals of the original award to the Board and to the Court of Appeals?
2. Did the Judge have the authority to entertain and decide the review and modification application while the original award was pending before the Court of Appeals?

¹ See K.S.A. 44-528 (Furse 1993).

² See K.S.A. 1999 Supp. 44-551(b)(2)(B) and K.S.A. 1999 Supp. 44-556(b).

Claimant argues that the review and modification award does not affect those weekly benefits that accrued and were paid for the period from April 28, 1999 (the effective date of the modified award), through December 9, 1999 (the last date for which benefits were paid while the original award was on appeal), totaling \$7,567.81. Claimant contends that respondent and its insurance carrier should not receive a credit for those payments. Additionally, claimant argues that the Judge did not have the authority to modify the original award while it was on appeal. Therefore, claimant requests the Board to reverse the July 21, 2000 Order. Conversely, respondent and its insurance carrier contend the Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, the Board finds and concludes:

1. The July 21, 2000 Order should be affirmed. When determining the amounts due under the review and modification award, respondent and its insurance carrier are entitled to a credit for all payments made to claimant during the appeals of the original award.

2. Claimant argues that respondent and its insurance carrier should not be allowed a credit for the \$7,567.81 paid during the pendency of the appeals for the period from April 28, 1999, through December 9, 1999. Instead, claimant argues that respondent and its insurance carrier must seek reimbursement from the Workers Compensation Fund. Claimant's argument is premised upon K.S.A. 1999 Supp. 44-556(d)(1), which provides:

If compensation, including medical benefits, temporary total disability benefits or vocational rehabilitation benefits, has been paid to the worker by the employer or the employer's insurance carrier during the pendency of review under this section and the amount of compensation awarded by the board is reduced or totally disallowed by the decision on the appeal or review, the employer and the employer's insurance carrier, except as otherwise provided in this section, shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a and amendments thereto for all amounts of compensation so paid which are in excess of the amount of compensation that the worker is entitled to as determined by the final decision on review. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection (d)(1), and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith.

3. The Board concludes that K.S.A. 1999 Supp. 44-556 does not address the present situation. That statute applies to credits when an award issued by the Board is later reduced by the Court of Appeals. In short, the statute provides that credits are first applied

to lump sum amounts that are due and are next applied to the last weeks of any weekly payments that are payable in the future. If the credit exceeds the lump sum and future weekly payments, the statute entitles the respondent and its insurance carrier to seek reimbursement from the Workers Compensation Fund. The statute neither addresses nor applies to credits when an award is reduced because of a review and modification proceeding, which is the situation in this case.

4. The award entered in the review and modification proceeding reduced the amount of permanent partial disability benefits that claimant was entitled to receive in this claim. The Workers Compensation Act provides that an employer and its insurance carrier are entitled to a credit for any amounts paid by the employer and its insurance carrier before the date of the award. K.S.A. 44-525(b) (Furse 1993) reads, in part:

No award shall be or provide for payment of compensation in a lump sum, except as to such portion of the compensation as shall be found to be due and unpaid at the time of the award . . . **and credit shall be given to the employer in such award for any amount or amounts paid by the employer to the employee as compensation prior to the date of the award.** (Emphasis added.)

The Board concludes that the above-quoted statute is equally applicable to review and modification awards as it is to initial awards. Therefore, the Board concludes that respondent and its insurance carrier are entitled to a credit for all the benefits paid to claimant, including those paid during the appeals to both this Board and the Court of Appeals.

5. The Board notes that claimant previously argued, and continues to argue, that the Judge lacked the authority to enter the February 14, 2000 Review and Modification Award as the original award was on appeal to the Court of Appeals. The Board previously decided that issue against claimant in one of the several orders entered by the Board in this claim on August 31, 2000, which claimant did not appeal. The Board stated and held:

The Appeals Board finds and concludes that the Administrative Law Judge had the authority to entertain a review and modification proceeding despite the fact that the original award was pending before the Court of Appeals.

When the basis for review and modification is changed circumstances, the issues before the Judge in a review and modification proceeding are different than the issues decided in the original award. The review and modification addresses the changed circumstances and determines the award for the period beginning with the effective date of the modification. On the other hand, the original award addresses the facts at

the time of the regular hearing and determines the award for the period beginning with the date of accident.

The Appeals Board finds and concludes that the legislature intended for awards to be modified upon a change of circumstances despite the fact that an appeal might be pending. Further, the Supreme Court in *Brown* [*Brown v. Goodyear Tire & Rubber Co.*, 211 Kan. 742, 508 P.2d 492 (1973)] determined that a review and modification award was a new award, which was based upon an entirely new and different record from the record presented at the time of the original award. The Court reasoned:

In *Brewington v. Western Union* [citations omitted] we held that an award of compensation made pursuant to the provisions of K.S.A. 44-528, providing for a review and modification of a former award, constitutes a new award. It is in no sense a review of the former award. In *Brewington* we pointed out that the purpose of 44-528 is to provide a means of increasing, decreasing or canceling compensation in accordance with the changed condition of the workman as justice requires. The compensation act provides its own complete and exclusive procedure. It makes no provision for the enforcement of a former award after it has been modified by the director in conformity with the statutory procedure for review and modification. In *Brewington* we also stated that the mere fact that an appeal had been perfected from the new award, which appeal was then pending in the district court, did not operate to reinstate the former award. The appeal from the new award presents to the district court an entirely new and different record from the record presented at the time the original award was made. . . .³

In *Brown*, the Supreme Court did not question whether an award that was pending before it could be modified. Instead, the Court determined that the review and modification award rendered moot the issues that had been presented by the original award and, therefore, dismissed the appeal.

The Board continues to hold that a review and modification proceeding addresses both different facts and different time periods. Thus, the Board also continues to hold that an administrative law judge may entertain and decide a review and modification application despite the fact the initial award is on appeal.

³ *Brown*, p. 744.

AWARD

WHEREFORE, the Board affirms the July 21, 2000 Order entered by Judge Benedict.

IT IS SO ORDERED.

Dated this ____ day of April 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
 John R. Emerson, Kansas City, KS
 Bryce D. Benedict, Administrative Law Judge
 Philip S. Harness, Director